Supreme Court, U. S.
FILED
FEB 4 1977
MICHAEL RODAK, JR., CLERK

76-1083

No.

In the Supreme Court of the United States

PHILLIP RAE DAVISON,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

GEORGE L. NORMAN
IVAN T. WEBBER
NORMAN, YOUNGGREN & WEBBER
30 North Fourth Street
Keokuk, Iowa 52632
Attorneys for Petitioner.

The Scheffer Press, Inc.—(312) 263-6850

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

PHILLIP RAE DAVISON,
Petitioner,

vs.

STATE OF IOWA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Comes Now Phillip Rae Davison and prays this Court grant a Writ of Certiorari to the Supreme Court of the State of Iowa and in support thereof shows the Court:

OPINIONS BELOW

Petitioner's case in the Supreme Court of Iowa was styled *State of Iowa, Appellee,* v. *Phillip Rae Davison, Appellant,* No. 58948 and is not officially reported. The opinion of the Supreme Court of Iowa in this matter has been reported at 245 N.W.2d 321-24 (Iowa 1976). A copy of the opinion of the Supreme Court of Iowa is appended hereto and marked Exhibit A.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257(3) in that the validity of a State

Statute, Section 749A.2 of the 1975 Code of Iowa, is drawn into question on the ground that it is repugnant to the Sixth Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment. The question was raised below and decided adversely to Phillip Rae Davison by the trial Court on October 8, 1975 in Lee County, Iowa, in Criminal Cause No. 7839. Mr. Davison was convicted by a jury of violating Section 204.401 of the 1975 Code of Iowa. Judgment was entered against him on November 19, 1975, by the Honorable Harlan W. Bainter and the Petitioner was sentenced to the Men's Reformatory at Anamosa, Iowa, for a term not to exceed five (5) years. The conviction and judgment were appealed to the Iowa Supreme Court and affirmed by that Court on September 22, 1976. A rehearing was denied by the Iowa Supreme Court on November 8, 1976, whereupon Petitioner files this Petition for Writ of Certiorari.

QUESTIONS PRESENTED

Petitioner presents only one question for review: Whether Section 749A.2 of the 1975 Code of Iowa is repugnant to the Sixth Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment and specifically whether said Section denies persons in the position of the Petitioner the right to be confronted with witnesses against him as required by the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 749A.2 of the Code of Iowa provides:

> "749A.2 Presumption of qualification — acceptance in evidence. It shall be presumed that any employee or technician of the criminalistics laboratory is qualified or possesses the required expertise to accomplish any analysis, comparison, or identification done by him in the course of his employment in the criminalistics laboratory. Any report, or copy thereof, or the findings of the criminalistics laboratory shall be received in evidence in any court, preliminary hearing, and grand jury proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. An accused person or his attorney may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the proper county attorney at least ten days before the date of such criminal trial." Section 749A.2, Code of Iowa, 1975, Volume II, Page 3333.

Amendment Six of the Constitution of the United States provides:

> "Amendment 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S.C. Const. Amend. 6

STATEMENT OF THE CASE

This case commenced on May 14, 1975, upon the filing by M. Carl McMurray an Assistant County Attorney in Lee County, Iowa, of a County Attorney's Information

alleging that Phillip Rae Davison had committed the crime of unlawful delivery of a Schedule 1 controlled substance contrary to Section 204.401 of the Code of Iowa. As required by Iowa law, attached to the Information were minutes of testimony. Paragraph 3 of the minutes of testimony stated:

> "3. Stephen C. Eck will testify that he is a resident of Des Moines, Iowa, and that he is employed by the Iowa Bureau of Criminal Investigation and that on March 13, 1975, he received from Robert Johstono for analysis one envelope containing one heat-sealed plastic evidence bag containing one piece of white paper containing 29 squares of purported LSD; that he took a random sample of the 29 sample squares for analysis purposes and said square was found to contain lysergic acid diethylamide, commonly known as LSD."

Mr. Davison was tried before a jury at Keokuk, Lee County, Iowa, on October 8, 1975. Pursuant to Section 749A.2 of the 1975 Code of Iowa, Mr. Stephen C. Eck was not called as a witness. In lieu of calling Mr. Eck as a witness the following occurred in the examination of Mr. Robert Johstono by Mr. M. Carl McMurray, Assistant Lee County Attorney:

> "Q. Now, I hand you, sir, what has been marked as State's Exhibit 3, and ask you if you can identify that, please?
>
> A. Yes, sir, I can. This is a laboratory case analysis form.
>
> Mr. Norman: Your Honor, he has answered the question. I object. I object to any testimony about what the exhibit contains.
>
> The Court: The objection will be sustained. You may answer another question.

Q. (By Mr. McMurray) Without getting into what the exhibit contains, would you tell us what it is?

A. It's a laboratory analysis form.

Q. And this is the one you received from the laboratory?

A. Yes, sir.

Q. And that was a result of a contents — the results of the examination of this evidence that you purchased from the defendant?

A. Yes, sir, that is correct.

Mr. McMurray: Your Honor, at this time the State will offer State's Exhibits 1, 2 and 3.

The Court: Mr. Norman, any objection?

Mr. Norman: Yes. I object to the photograph that has been marked Exhibit 1. It's incompetent, irrelevant and immaterial, and has no probative effect. Make no objection to Exhibit 2. I object to Exhibit 3 on the basis it's hearsay and not the best evidence. Violates the Constitutional rights of the defendant under Article VI — Excuse me, Amendment VI of the Constitution of the United States, Section 10 of Article I of the State of Iowa.

The Court: For what reason?

Mr. Norman: For what reason?

The Court: Yes.

Mr. Norman: It's to be used as evidence, no proper foundation. This person didn't make it. He is just testifying what it is. In spite of 749A, which I think is an unconstitutional act by the State of Iowa.

The Court: In other words, your objections go to that statute on top of the —

Mr. Norman: Yes, it does.

The Court: Let's look at that exhibit. Let me ask, Mr. Norman, did the defendant or did you at any time request under 749A.2 at least ten days before this trial date, that Mr. Eck be present as a witness at this trial?

Mr. Norman: I did not.

The Court: I'm going to overrule the objection to State's Exhibit 1, which is a photograph. It will be admitted. State's Exhibit 2, there was no objection. It will be admitted.

Mr. Norman: I would like to extend my objection to three.

The Court: All right, you may extend it.

Mr. Norman: I would like to read from the Constitution specifically. Amendment VI to the Constitution of the United States. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . ."

And that particular section of that amendment is the reason I am objecting to this particular exhibit. Article or Section 10 of Article I of the Constitution of the State of Iowa reads: "In all criminal prosecutions, the accused shall have a right to a speedy trial by an impartial jury; to be confronted with the witnesses against him. . . ."

And I'm objecting to that—I'm—That he is not confronted by the witnesses, and you are placing the burden on the defendant in this matter to call a witness to testify against him which is contrary to both the Constitutional provisions, and I think that the Section 749A.2 is unconstitutional, and that this exhibit should not be admitted.

The Court: Do you know of any cases, Mr. Norman, in which the Iowa Supreme Court has held Section 749A.2 unconstitutional?

Mr. Norman: I don't think it has been submitted to the Supreme Court.

The Court: The objection will be overruled, and the Exhibit 3 will be admitted under Section 749A.2 of the Code of Iowa." (Rec. Pages 6-10)

At the close of the State's case, the following transpired:

"Mr. Norman: Okay. Well, I want to renew my objection to the constitutional issue on the introduction of that exhibit.

The Court: That is 749A.2?

Mr. Norman: Yes, and I want to make a motion. Comes now the defendant and moves for a directed verdict on the basis the State has not proved the charge as alleged.

The Court: All right, now, the renewal of the objection to the report of the Criminalistics Laboratory which is identified as State's Exhibit 3 will be overruled; the Court understanding that the objection is being made because under the Sixth Amendment, the defendant is being denied the cross-examination, and I recognize that it is a good question. And it very well may be. We have had this raised before. I subscribe to the theory a little bit rather than of eighty separate District Court judges over the State of Iowa deciding how the Constitution should be construed, this is to some extent an inherent power of the Supreme Court of Iowa.

When you raise a constitutional question, and perhaps a valid one, that the real body that should make that determination is the Supreme Court of Iowa, because otherwise, we have a separate law in each of the hundred jurisdictions in Iowa, and this is not a very satisfactory way to do business. I think the Supreme Court should decide the constitutionality of the statute of the State of Iowa.

I think it's — I am frank to say I think it's a good question, because I think he is denied the right to cross-examination. The only way that might be construed out, is that the defendant has the right of confrontation of cross-examination, and, in fact, he does request that the witness be here.

The Constitution doesn't say that the witness should be required to do that, so I think there is — I think it really casts the burden on the defendant, which is not proper.

Mr. McMurray: That same issue was raised by Don Harris in a case that was prosecuted in 1973 against — about a motorcycle, and the Supreme Court ruled, and said it was, in their opinion, constitutional, and they so held, I think there was a previous one held to that, that they rendered unconstitutional.

The Court: I'm going to overrule the objection, again, to Exhibit 3, and the motion for directed verdict will, of course, be denied and overruled." (Rec. Pages 10-12)

Exhibit 3 essentially showed when combined with the testimony of Mr. Robert Johstono that paper taken from the Defendant contained lysergic acid diethylamide in contravention of the laws of the State of Iowa. No other evidence, except the objected to laboratory report, showed the substance taken from the defendant was an unlawful controlled substance. The defendant appealed to the Supreme Court of the State of Iowa alleging that Section 749A.2 of the Code of Iowa is unconstitutional as violating the Sixth Amendment to the Constitution of the United States. The Iowa Supreme Court held otherwise and affirmed Mr. Davison's conviction on September 22, 1976. A Petition for Rehearing was denied on November 8, 1976. A copy of the Order denying rehearing is appended hereto and marked Exhibit B.

REASONS FOR GRANTING WRIT OF CERTIORARI

The reason it is important for this court to grant Phillip Rae Davison a Writ of Certiorari is because the question presented by Mr. Davison is important in the context of a proper procedural interpretation of the Constitution of the United States. In simple, direct terms, it is clear that under the Fifth and Fourteenth Amendments to the Constitution of the United States, the State has the entire burden of proving each element of an offense beyond a reasonable doubt. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). Another way of phrasing the question presented by the Petitioner is whether under the Sixth Amendment the same burden falls upon the State in the requirement that the accused be confronted with the witnesses against him. That is, by statutory presumption, can the State establish a system that requires a defendant to pick and choose which of his accusers he wishes to be confronted by and which accusers he will simply allow to accuse him upon an unsworn written statement. 749A.2 of the Code of Iowa does two interesting and rather pernicious things. First, it establishes a presumption that:

> "*Any employee* or technician of the criminalistic laboratory is qualified or possesses the required expertise to accomplish any analysis, comparison, or identification done by him in the course of his employment in the criminalistic laboratory. . . ." Section 749A.2, Code of Iowa, 1975, Volume II, Page 3333. (emphasis added)

This first sentence alone raises grave questions under the Sixth Amendment as applicable to the states under the Fourteenth Amendment. Were a defendant to require

the State to bring forward as a witness an employee of the criminalistics laboratory, his right to cross-examine that employee has been severely constrained by statute, as the qualifications of that employee as an expert have been enshrined in an inassailable fortification of presumptive qualification which renders atrophied and useless attacks on qualification through cross-examination. The State is not even required to say whether their witness has any qualifications at all; merely that he is an employee of the criminalistics laboratory. Taken to its furthest extreme, the statute could literally make an illiterate janitor an expert, yet the defendant would not be allowed to attack his qualifications.

The second thing which 749A does is make any report made by any of the employees admissible in a criminal cause without supporting testimony of the employee unless the defendant requests the personal presence at a criminal trial of the technician to testify on behalf of the State and such notification must be sent at least ten (10) days prior to the criminal trial.

This Court essentially held in *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975): *In re Winship,* 397 U.S. 358 (1970), that a State could not shift the burden both of persuasion and of bringing forward evidence to a defendant upon any element of a criminal offense. The Petitioner asks this Court to now decide that it is also impermissable for a State to shift the burden to a defendant of calling a witness against him under the confrontation clause of the Sixth Amendment. In that Section 749A.2 of the Code of Iowa requires a defendant to call the witness against him, and if he does not call the witness lose the right to then cross-examine the witness when the witness provides testimony essential to the State's case, it is unconstitutional under the Sixth Amendment to the Constitution of the United States.

It is important to note that grave Constitutional issues are presented dealing with our traditional concept of a fair trial. Both persons trained in the law and the general citizenry have long harbored a belief, often supported by decisions of this Court, that in criminal prosecutions, if a defendant so chooses, he need do absolutely nothing to protect his rights by means of affirmative action. That is, there is no requirement for him to call any witness, no requirement for him to take the witness stand, no requirement for him to prove an alibi and no possibility that a verdict may be directed against him. Section 749A.2 of the 1975 Code of Iowa runs contrary to these well-established notions. Moreover, in making evidence admissible without presenting witnesses to verify the validity of the evidence, and allowing the maker of the evidence to avoid cross-examination, it violates the core of the confrontation provision of the Constitution, which is the right to cross-examine witnesses against a defendant. Even if called, a good deal of the traditional cross-examination to which an expert could be subjected is precluded by the statute. Moreover, why should a defendant have to call a witness against himself? That burden seems not only curious but constitutionally impermissable.

Cross-examination of an expert in a drug case involving LSD may be of no consequence whatsoever. Then again, it may also be a grave consequence. Lysergic acid diethylamide (LSD) is a powerful hallucenogen that often presents difficulties in identification. 3 *Criminal Defense Techniques,* Section 57.05[2](v), Page 57-67. There are many substances which are chemically close

to lysergic acid diethylamide which have no hallucenogenic properties. *Id.* The commonly used color test (Van Urk) will indicate the probable presence of LSD but does not rule out the presence of other harmless equivalent substances. *Id.* The drug can be identified because of its characteristic Ord curve, but only if the sample tested is pure. *Id.*

The Constitution requires the State present evidence other than an ipso facto presumption that its chemists are qualified and that its tests were properly conducted. *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975); *In re Winship,* 397 U.S. 358 (1970). Confrontation is an important right. It is not absolute, but can, when weighed against legitimate interests of the state, prevail. *Davis* v. *Alaska,* 415 U.S. 308 (1974). Clearly the state must show a grave interest before it may cast the burden on the defendant to come forward with witnesses. This Iowa has not done. The Constitution, Article VI, as applied to the states by the Fourteenth Amendment, requires that the State produce these witnesses without burden to the defendant.

Phillip Rae Davison asks this Court to confirm his constitutionally protected right to a fair trial at which the state has the burden to call witnesses. Such a decision would be in accord with this Court's holding in *Mullaney, Winship* and *Davis* v. *Alaska.* The holding of the Supreme Court of Iowa in this case was not.

CONCLUSION

For the above and foregoing reasons, Petitioner asks that a Writ of Certiorari issue to the Supreme Court of Iowa in this cause.

Respectfully submitted,

GEORGE L. NORMAN
30 North 4th Street
Keokuk, Iowa 52632

IVAN T. WEBBER
30 North 4th Street
Keokuk, Iowa 52632
Attorneys for Petitioner.

APPENDIX A

IN THE SUPREME COURT OF IOWA

193
58948

STATE OF IOWA,

Appellee,

vs.

PHILLIP RAE DAVISON,

Appellant.

Filed September 22, 1976

Appeal from Lee District Court, HARLAN W. BAINTER, *Judge*.

Defendant appeals from conviction of crime of unlawful delivery of a Schedule I controlled substance, to-wit: LSD.

AFFIRMED.

Norman, Younggren & Webber of Keokuk for appellant.

Richard C. Turner, Attorney General, Dorothy L. Kelley, Assistant Attorney General, of Des Moines, Barry M. Anderson, County Attorney, and M. Carl McMurray, Assistant County Attorney, of Keokuk, for appellee.

Heard by MOORE, *C.J.*, and LEGRAND, REES, UHLENHOPP and REYNOLDSON, *JJ*.

REES, *J*.

Defendant was charged by county attorney's information with the crime of unlawful delivery of a Schedule I controlled substance in violation of § 204.401(2)(b), The Code, 1975. Following his plea of not guilty, he was tried, convicted and sentenced, and now appeals. We affirm.

There appears to be no factual dispute in this case. Defendant states for review the following issues:

1. Section 749A.2, The Code, is unconstitutional in that it denies to defendant the right to be confronted by his accusers by placing an imprimatur of validity upon the ex parte report of a State's witness, and shifting to the defendant the burden to produce the person of the witness for cross-examination.

2. Trial court erred in improperly admitting over proper and timely objection, a prejudicial photograph of the defendant taken proximate to the time of his arrest.

3. Trial court erred in failing to direct a verdict for defendant upon defendant's motion where it was asserted the State had failed to prove the controlled substance involved was counterfeit, as alleged in the county attorney's information.

I. Defendant contends the trial court erred by admitting into evidence over defendant's objections a report of the Criminalistics Laboratory pursuant to § 749A.2, The Code, 1975.

Defendant contends § 749A.2 unconstitutionally denied defendant the right to be confronted by witnesses against him and that the statute, § 749A.2, which provides that an accused may request the personal presence of the laboratory employee who prepared the report to testify, by defendant giving notice requiring the presence of the employee, impermissibly shifts the burden of proof to the defendant. We are asked by defendant to reexamine our holding of constitutionality in State v. Kramer, 231 N.W.2d 874 (Iowa 1975). In *Kramer* we observed in connection with an identical contention that defendant was confronted at the outset with a strong presumption of constitutionality of regularly enacted statutes. State v. Kueny, 215 N.W.2d 215, 216 (Iowa 1974).

Further, in *Kramer, supra,* at page 880 of 231 N.W.2d, we said:

> "If the main and essential purpose of confrontation is to secure for the accused the *opportunity of cross-examination,* (citations) there is no constitutional infirmity in § 749A.2. Here defendant chose not to exercise his right to cross-examine."

Defendant's complaint that he was denied the right of confrontation seems to be answered fully by the above quotation from *Kramer, supra.*

Defendant further contends *Kramer* should be reconsidered in the light of recent cases finding due process violations where the burden of proof is placed on defendant with regard to facts essential to establish the crime. See Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); State of Monroe, 236 N.W.2d 24 (Iowa 1975). Defendant asserts the burden of producing the laboratory technician is unconstitutionally shifted to the defendant. Section 749A.2, The Code, expressly provides a presumption of admissibility, and presumptions are permissible under *Mullaney, supra,* so long as due process requirements are met. See *Mullaney, supra,* 421 U.S. , 95 S.Ct. 1891-1892, 44 L.Ed. 2d .

Defendant does not contend or has at no time asserted he would have cross-examined the laboratory technician if the technician had been produced by the State. He waived the opportunity to examine the technician by failing to notify the county attorney as the statute required. Defendant alleges no prejudice which occurred to him by the absence of the technician, and we find no violation of defendant's due process rights under § 749A.2, The Code.

II. Defendant next contends the trial court improperly admitted a prejudicial photograph of defendant over a proper and timely objection. He contends that his identity as the man with whom the State's witnesses had been in contact was never in dispute.

The photograph, taken at the time of defendant's arrest, showed a young man against a background of police height calibrations with shoulder length hair, a

torn tee-shirt, a beard and a loose jacket. While there is nothing in the record to indicate how defendant's appearance at the trial might have contrasted with his appearance at the time the photograph was taken, we are not persuaded the trial court erred in overruling defendant's objections to the admission of the photograph into evidence.

A ruling of a trial on the admissibility of a photograph will not be overturned unless a clear abuse of discretion is found. State v. Thomas, 222 N.W.2d 488, 493 (Iowa 1974); State v. Lunsford, 204 N.W.2d 613, 617 (Iowa 1973). Defendant asserts his identity was not in issue in this case, but the record does not indicate any stipulation or agreement on the part of the defendant that he was the person who made the delivery of the controlled substance to avoid the necessity of identification evidence.

The photograph was introduced by the State in connection with the identification of the person who delivered the controlled substance to the undercover agent. The trial court was clothed with considerable discretion in admitting the photograph and we find nothing in the record to indicate an abuse of the same. See State v. Ostrand, 219 N.W.2d 509, 513 (Iowa 1974).

III. Defendant next asserts trial court erred in failing to direct a verdict for defendant upon motion made at the close of the State's evidence and renewed after both the State and defendant had rested, in which he said the State had failed to prove the controlled substance involved in the offense charged was counterfeit as alleged in the county attorney's information.

The record does in fact reflect an inconsistency in the information filed by the county attorney. Defendant was charged with the unlawful delivery of a controlled substance, to-wit: LSD, and as originally filed the information charged a violation of § 204.401, The Code, 1975. On the morning of the commencement of the trial, the record establishes that the information was amended by the county attorney, in the presence of the court and

of defendant's counsel, writing on the original information following the cited section the additional symbols, "(2)(b)" so that the defendant then stood charged with the violation of § 204.401(2)(b), The Code, 1975. Subsection (2)(b) relates to controlled substances which are counterfeit, and it is defendant's claim in this appeal the State was required to show that LSD is a counterfeit substance.

The purpose of a county attorney's information (or indictment) is to afford the person charged with an opportunity to prepare a defense. Sufficient notice of the charge pending must be given. Defendant in this case came to court prepared to defend against the charge that he had unlawfully delivered a Schedule I controlled substance, to-wit: LSD, to one Robert Johstono on March 11, 1975, in Jackson Township, Lee County, Iowa. He does not allege any prejudice to him by virtue of the amendment of the information in the manner in which the amendment was affected. Nor does he allege any inadequacy of notice of the amendment of the information.

Where adequate notice is given a defendant by a valid information, as in this case, the conviction for a crime charged will stand even though a variance is found in a reference to a statute. State v. Davis, 41 Iowa 311 (1875). The citation of the proscriptive statute by section or chapter in an indictment or information is not necessary under the provisions of § 773.4, The Code, 1975, and the citation of the section of a statute might even be considered surplusage under § 773.31, The Code.

Obviously, the jury found the defendant guilty of the unlawful delivery of a controlled substance, LSD. He was sentenced for a violation of § 204.401, The Code, and we must conclude the sentence was imposed following defendant's conviction of the crime charged in the information.

We find no merit in any of defendant's issues stated for review, and affirm the trial court.

AFFIRMED.

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 58948
ORDER

STATE OF IOWA,

Appellee,

vs.

PHILLIP RAE DAVISON,

Appellant.

Filed November 8, 1976

Defendant-appellant's petition for rehearing has been duly considered by the entire membership of the court and is now denied.

Done this 8th day of November, 1976.

/s/ C. Edwin Moore
Chief Justice-Iowa Supreme Court

Copies to:
Ray Sullins
Assistant Attorney General
George L. Norman and
Ivan T. Webber
30 North 4th St.
Keokuk, Iowa 52632